

ADDENDUM TO
RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

AUG 14 1998

IN THE MATTER OF:

DOCKET NUMBER: 94-00739

E :

HEARING DESIRED: Yes

RESUME OF CASE:

In an application dated 25 January 1994, applicant requested that he be allowed to enlist in the Regular Air Force, in the grade of staff sergeant; or in the alternative, he be offered the option to elect the Variable Separation Incentive (VSI) or the Special Separation Benefit (SSB).

On 25 May 1995, the Board considered and denied applicant's request. The Board concluded that applicant was eligible but chose to decline the VSI/SSB programs after being advised by his commander that he would be a candidate for the Fiscal Year 1993 (FY93) Reduction-In-Force (RIF) Board. Additionally, after being selected by the RIF and given the opportunity to reenlist as early as September 1992, he elected to remain on active duty and reenlist effective 1 January 1993, thereby maximizing the amount of pay and allowances he would receive as an officer. The National Defense Authorization Act (NDAA), enacted 23 October 1993, amended Section 8258 by deleting the reenlistment eligibility of former Reserve officers who separated for qualitative reasons or whose former Regular Air Force enlisted status and grade were based solely on participation in a precommissioning program. This change applied to all officers discharged or released from active duty after the enactment date and did not provide grandfathering of individuals in applicant's situation. In an exception to policy, the Air Force allowed individuals, such as applicant who had previously obtained authorization to reenlist, the opportunity to reenlist under the provisions of the Prior Service program provided they received their former commander's recommendation. Applicant's former commander did not recommend him for enlistment. The law precluded applicant's reenlistment and the Board's authority is limited to what is allowed by law. Further, a review of applicant's record did not provide a basis upon which to conclude that the commander's decision was arbitrary or capricious. A complete copy of the Record of Proceedings is attached at Exhibit G.

Applicant's counsel submitted additional information on 16 May and 25 August 1998, requesting *de novo* consideration of applicant's request and amended applicant's requests (Exhibits H

and K). Counsel asserts that the Air Force had an obligation to advise applicant of pending legislation that ultimately changed his reenlistment rights. The amended requests are as follows:

1. Voiding of applicant's release from active duty in the United States Air Force (USAF), effective 31 December 1992;

2. Correction of applicant's records, and any other records and/or system(s) of records of the Department of the Air Force, to show applicant's reenlistment in the USAF, effective 22 October 1992, for a period of six (6) years;

3. Correction of applicant's records, and any other records and/or system(s) of records of the Department of the Air Force, to show that applicant has been serving on active duty in the USAF in an enlisted status since 22 October 1992;

4. Incorporation into applicant's records of an appropriate and nonprejudicial statement to show that applicant was non-rated during the period from 22 October 1992 to the date of retroactive reinstatement in an active status in the USAF; and

5. Such other and/or further relief as may be deemed necessary and/or appropriate in order to accord applicant full and complete relief including, but not limited to, the payment of any pay and allowances due as a result of the correction of applicant's records.

Applicant's case has been reopened at this time.

AIR FORCE EVALUATION:

The Staff Judge Advocate, AFPC/JA, reviewed the new information and recommended denial on the basis that applicant failed to state an error upon which relief could be granted.

A complete copy of the evaluation is attached at Exhibit L.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Counsel reviewed the Air Force evaluation and provides a 31-page response, with attachments, which is attached at Exhibit R.

THE BOARD CONCLUDES THAT:

1. We note applicant's request for *de novo* consideration; however, we find no compelling basis upon which to grant this relief. Such action would constitute preferential treatment not

available to other applicants similarly situated and could be construed as an unfair advantage that other applicants do not receive.

2. Notwithstanding the aforementioned, we find insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. Counsel's numerous contentions regarding the Air Force's obligation to advise applicant of pending changes in legislation which would impact his eligibility to reenlist in the Regular Air Force are duly noted; however, we do not find these uncorroborated assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force. Counsel would have us believe that it was the responsibility of the Air Force to brief the applicant on what the effects of the pending legislation would have had on his right to reenlist should this legislation be approved and signed into law. On the contrary, as indicated by the Air Force, there was no statutory requirement, no requirement imposed by judicial ruling, and no administrative burden imposed by the Air Force or the Department of Defense regulation, directive or instruction to do so. In fact, applicant presents insufficient documentation to persuade us that he would have reenlisted prior to the change in legislation had he been so advised. We make this observation on the basis that he was briefed regarding his eligibility to elect VSI/SSB after being advised that he would be a candidate for the RIF and yet chose to remain on active duty and subject himself to the RIF. Further, it would have been truly speculative on the part of the Air Force to attempt to predict which way Congress would have voted on the proposed legislation and whether or not the President would have signed the National Defense Authorization Act, which ultimately resulting in applicant's ineligibility to reenlist. In this respect, we find no evidence that applicant was treated any differently than other individuals similarly situated. In fact, realizing the impact this approved legislation would have on affected members, the Secretary created an exception to policy which would have allowed applicant's reenlistment, upon an approved recommendation from his commander. The fact that he was not recommended was apparently predicated on his overall performance as an officer. Again, we find no evidence that the commander's decision was arbitrary or capricious. We therefore, agree with the recommendation of the Staff Judge Advocate and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain his burden of establishing the existence of either an error or an injustice,

3. The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issue(s) involved. Therefore, the request for a hearing is not favorably considered.

THE BOARD DETERMINES THAT:


The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 20 June 1998, under the provisions of AFI 36-2603:

Mr. LeRoy T. Baseman, Panel Chair
 Mr. Thomas S. Markiewicz, Member
 Mr. Richard A. Peterson, Member

The following documentary evidence was considered:

- Exhibit G. ROP, dated 28 Jun 95, w/atchs.
- Exhibit H. Counsel's Submission, dated 16 May 97, w/atchs (1-90).
- Exhibit I. Letter, AFBCMR, dated 6 August 97.
- Exhibit J. AFBCMR Memorandum For AFPC/JA, dated 6 Aug 97.
- Exhibit K. Counsel's Letter, dated 25 Aug 97, w/atchs (91-97).
- Exhibit L. Letter, AFPC/JA, dated 25 Nov 97.
- Exhibit M. Letter, AFBCMR, dated 8 Dec 97.
- Exhibit N. Letter, Counsel, dated 8 Jan 98.
- Exhibit O. Letter, AFBCMR, dated 14 Jan 98.
- Exhibit P. Letter, Counsel, dated 30 Jan 98.
- Exhibit Q. Letter, AFBCMR, dated 6 Feb 98.
- Exhibit R. Counsel's response, dated 14 Apr 98, w/atchs (98-103).


 THOMAS S. MARKIEWICZ
 Acting Panel Chair